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No. 03-1037

IN THE
Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.*, Members of the Nevada State Assembly and Nevada State Senate,
Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEVADA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL TAXPAYERS UNION, THE NEVADA MANUFACTURERS ASSOCIATION, THE HOWARD JARVIS TAXPAYERS FOUNDATION, AMERICANS FOR LIMITED GOVERNMENT, AMERICANS FOR TAX REFORM, THE CLUB FOR GROWTH, NEVADA CORPORATE HEADQUARTERS, INC., THE NEVADA MOTOR TRANSPORT ASSOCIATION, THE NEVADA TAXPAYERS ASSOCIATION, THE RETAIL ASSOCIATION OF NEVADA, AND THE RENO-SPARKS CHAMBER OF COMMERCE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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February 20, 2004

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE[1]

The National Taxpayers Union, the Nevada Manufacturers Association, the Howard Jarvis Taxpayers Foundation, Americans for Limited Government, Americans for Tax Reform, the Club for Growth, Nevada Corporate Headquarters, Inc., the Nevada Motor Transport Association, the Nevada Taxpayers Association, the Retail Association of Nevada, and the Reno-Sparks Chamber of Commerce respectfully move, pursuant to Rule 37.2(b) of this Court, for leave to file a brief

[1] With the exception of Nevada Corporate Headquarters, Inc. ("NCH"), none of the parties submitting this brief has a parent corporation, and no publicly held company owns 10 percent or more of any party. NCH is a wholly-owned subsidiary of Superior Capital Corporation, a Nevada limited partnership. Neither it nor its parent company issues shares to the public.

as amici curiae in support of petitioners. Counsel for petitioners has granted consent to file this brief. Counsel for respondents have not granted consent.

The foregoing groups represent taxpayers and businesses whose interests are put in jeopardy by the decision of the Supreme Court of Nevada in this case. When public officials transgress the structural limits on their authority, particularly with respect to taxation and appropriation, they undermine the concept of a "Republican Form of Government" guaranteed by Article IV, § 4, of the Constitution. Such transgressions threaten the economic and political interests of people who care deeply about, and are seriously affected by, the way government collects and spends money.

The interests of the groups making this motion fall into two distinct areas. The first is protection of taxpayers from governmental indifference or hostility to their interests, often attributable to rent-seeking behavior involving political factions and public officials. The second is protection of vulnerable political constituencies from onerous, targeted taxes that are rendered more feasible by the abandonment of super-majority requirements. These groups note with dismay the cavalier decision of the Supreme Court of Nevada to disregard an important structural restraint put in place by the voters of Nevada to prevent the adoption of new taxes without the support of a super-majority of the legislature.

The National Taxpayers Union is considered the nation's oldest organization representing individual taxpayers. One of its key goals is adoption of constitutional limitations on the power of government at all levels to impose taxes and incur debt. A non-profit, civic organization founded in 1969, it represents over 350,000 members in all 50 states. Its members played important roles in the passage of the Nevada measure

and similar limitations in other states, and it submitted briefs amicus curiae to this Court in support of the petitions in *Missouri v. Jenkins*, 515 U.S. 70 (1995), and *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, West Virginia*, 488 U.S. 336 (1989), both of which this Court accepted for review.

The Nevada Manufacturers Association ("NMA") is a non-profit corporation organized under the laws of Nevada. Its mission is to protect and support the manufacturing companies in Nevada. NMA has close to 400 members, with membership varying from the largest manufacturing company in Nevada to some with one or two employees. NMA was the lead signatory to a brief amicus curiae submitted to the Supreme Court of Nevada in the instant litigation.

The Howard Jarvis Taxpayers Foundation ("HJTF") is a non-profit charitable foundation devoted to economic education, the study of tax policy, and defending the interests of taxpayers in the courts. In support of its activities, HJTF has also sponsored numerous studies and fora on the subject of taxation and public spending.

Americans for Limited Government ("ALG") is a non-profit civic organization that advocates policies on the state and federal level that seek to reduce governmental spending and regulation. ALG also supports efforts to increase judicial accountability and reinstatement of the Tenth Amendment's policy of enumerated powers. ALG opposed the tax increase referendum in Alabama in 2003 and the referenda in Oregon in January 2003 and February 2004.

Americans for Tax Reform is a non-profit organization that serves as a national clearinghouse for the grassroots taxpayers'

movement by working with approximately 800 groups at the state and county level.

The Club for Growth is a nationwide political membership organization dedicated to advancing public policies that promote economic growth. It represents over 15,000 members in all 50 states.

Nevada Corporate Headquarters, Inc., is a wholly-owned subsidiary of Superior Capital Corporation, a Nevada limited partnership. It participated as amicus curiae in the proceedings in the Supreme Court of Nevada below.

The Nevada Motor Transport Association is a nonprofit association devoted to promoting the interests of the motor carrier industry. It currently has 317 members.

The Nevada Taxpayers Association ("NTA") is a non-partisan, non-profit membership association serving the citizens of Nevada since 1922 by advocating for responsible government at a reasonable price. NTA provides research on fiscal issues to policy makers and the public, and has been recognized by the Legislature of Nevada and by Governors of the State for its unbiased research. NTA has approximately 800 members statewide, including individuals, businesses of all sizes and forms of organization, and public agencies at both the state and local level. NTA has submitted briefs amicus curiae in a variety of cases involving taxation and the imposition of fees, including the instant litigation.

The Retail Association of Nevada advocates for many of the major retailers and a large portion of the small retailers in the state on issues involving state and local government. It has 700 members within the state. One of its main goals is to keep

Nevada a business friendly state. It has taken part in previous litigation involving a proposed tax on business income.

The Reno-Sparks Chamber of Commerce ("RSCC") is a non-profit organization that represents the regional and business community in the Reno/Sparks/Tahoe area. It has 2,100 members.

No party would suffer undue prejudice were the Court to accept this brief for filing.

Respectfully submitted,

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February 20, 2004

QUESTIONS PRESENTED

1. Whether a state supreme court's abrogation of a structural constitutional rule governing the enactment of legislation, pursuant to a rationale that would just as readily call for the abrogation of any similar rule, violates the Guarantee Clause of the federal Constitution.

2. Whether a state supreme court's abrogation of a structural constitutional rule governing the levying of taxes violates the Guarantee Clause of the federal Constitution by essentially transferring the power of the purse to the judiciary.

3. Whether, in circumstances where a state supreme court has definitively abrogated a key structural provision of a state Constitution, no other branch of the federal government has spoken to the issue, and a judicial remedy is clearly available, this Court should resolve a case arising under the Guarantee Clause on the merits.

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STATEMENT OF INTEREST[1]

As explained in the foregoing motion for leave to file a brief as amici curiae, the groups submitting this brief have a direct and substantial interest in this case. Separation of powers and the various structural restraints on public officials established by our constitutional system — including such restraints as super-majority requirements for new taxes — are the most effective defense against arbitrary government and selective, adverse legislation. When government ignores these restraints, or indeed is ordered to do so by the very judiciary that is supposed to enforce such restraints, taxpayers, businesses, and the citizenry as a whole are vulnerable.

The various groups submitting this brief have been active, and indeed have often taken the forefront, in protecting the interests of taxpayers and merchants in the political and legal arena. They have promoted a variety of provisions along the lines of the super-majority rule at issue in this case, and they have participated as amici in a range of litigation implicating the rights of taxpayers and the commercial sector. In fact, the Nevada Manufacturers Association, the Nevada Taxpayers Association, the Retail Association of Nevada, Nevada Corporate Headquarters, Inc., and the Nevada Motor Transport Association all participated as amici below, and two of the amici, the Nevada Manufacturers Association and the Retail Association of Nevada, were parties in the parallel federal action, *Angle v. Legislature of Nevada*, 274 F.Supp.2d 1152 (D. Nev. 2003).

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[1] No counsel for a party wrote this brief in whole or in part, nor did any person or entity, other than amici, their affiliates, or their counsel, make a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Nevada at issue in this petition derogates radically from the principle of government by consent. In ordering Nevada's legislators to disregard an important constitutional and structural restraint on the adoption of new taxes, specifically, the requirement of a two-thirds majority in each house to pass any such measure, the Supreme Court of Nevada rendered every such restraint vulnerable to judicial override. Not only does this leave economic and political minorities vulnerable to targeted taxes, but it also fundamentally deviates from the concept of a "Republican Form of Government" guaranteed by Article IV, § 4, of the federal Constitution. Although this Court has tended to avoid deciding cases on the basis of the Guarantee Clause, nothing in the nature of this clause necessitates its desuetude, and the instant case is apt for its reinvigoration.

In addition, the decision of the Supreme Court of Nevada undermines separation of powers to such a profound degree that it violates the Guarantee Clause. In issuing a writ of mandamus against the state's legislators, and in ordering them to appropriate funds and raise taxes without regard to constitutional restraints to which they are subject, the Supreme Court of Nevada essentially re-allocated the power of the purse from the legislature to the judiciary. Although the states are generally free to divide power among the branches of government as they see fit, few if any concepts are more firmly grounded in the republican tradition than the idea that the legislature controls the purse strings.

Finally, there is nothing in the nature of the Guarantee Clause that renders it categorically unfit for judicial application. Although specific disputes arising under the clause may prove non-justiciable, the clause is nevertheless susceptible of judicial application in the proper circumstances. As Justice Brennan observed in his opinion for this Court in *Baker v. Carr*, 369 U.S. 186, 210-11 (1962), "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." The instant case presents none of the indicia of non-justiciability identified by Justice Brennan in *Baker*. No provision of the Constitution vests responsibility to apply the Guarantee Clause solely in a branch of the federal government other than the courts; no other branch of the federal government has even purported to address the issues presented; and, because of the clear incompatibility of the Supreme Court of Nevada's decision with the principles of government by consent, this Court is fully capable of determining whether its decision can stand. *See Baker*, 369 U.S. at 217.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF NEVADA'S DECISION LEAVES ALL STRUCTURAL RESTRAINTS ON THE LAWMAKING PROCESS VULNERABLE TO JUDICIAL OVERRIDE.

Article IV, § 4, of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." Although this Court has been reluctant to apply the Guarantee Clause to cases presented to it for review, *see Baker v. Carr*, 369 U.S. 186, 209 (1962), nothing in the nature of the clause necessitates rendering it a dead letter so far as the judiciary is concerned. In fact, only twelve years ago, in *New York v. United States*, Justice O'Connor took note of continued support for reinvigoration of

the clause, and recognized such reinvigoration as presenting a "difficult" issue that awaits resolution. 505 U.S. 144, 185 (1992). Since then, a number of lower federal courts have contemplated the resolution of disputes arising under the Guarantee Clause on the merits, although none has actually predicated a decision on that ground. *See, e.g., Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Kelley v. United States*, 69 F.3d 1503, 1510-11 (10th Cir. 1995). Amici respectfully submit that no case would be more apt for reinvigoration of the Guarantee Clause than the instant one. Enforcement of the clause in such a clear and egregious example of derogation from the principles of a "Republican Form of Government" as this would prove salutary for the states and for the nation as a whole.[2]

The history of the founding era indicates quite strongly that one of the principal concerns underlying the Guarantee Clause was fear that a non-republican form of government, taking hold in one state, might cause other states to follow suit, and in time threaten the entire nation. *See, e.g.,* The Federalist No. 43 (James Madison). Although this may sound far-fetched to modern ears, it actually reflects great foresight. Not long after the Supreme Court of Nevada announced its decision in this case, public officials in California expressed an intention to seek similar relief from the courts of that state. *See, e.g.*, Evan Halper & Gregg Jones, *The State; Official to Sue Over Budget Impasse*, L.A. Times, July 17, 2003, at B6 ("A spokesman for Supt. Jack O'Connell said Wednesday that officials would use an argument similar to one that recently led the Nevada Supreme Court to grant Republican Gov. Kenny Guinn's request to intervene in that state's budget debate."). And the decision in Nevada may have ramifications in Arkansas as well.

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[2] For further analysis on this point, see Part III, *infra*.

See David Robinson, *Court To Appoint Special Master*, Fort Smith Times Record, Jan. 23, 2004, available at http://www.swtimes.com/archive/2004/January/23/news/special_master.html (discussing prolonged litigation over funding for schools in Arkansas) ("[The] Justices noted that in Nevada, to break an impasse on taxes to support education, the high court ordered that the Legislature there ignore a constitutional provision requiring a two-thirds vote and pass the taxes with a simple majority.").

It is true, of course, that the framers of the Guarantee Clause were most notably anxious about violent takeovers, as is evidenced by the other clauses in Article IV, § 4,[3] but they did not limit their attention to such possibilities. As commentator Arthur Bonfield noted in an article that this Court has cited, the goal of those who wrote and ratified the Guarantee Clause was to "prevent the creation by any means, *whether peaceful or otherwise*, of aristocratic, monarchial, or despotic state governments." Arthur Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 522 (1962). *See New York*, 505 U.S. at 183 (citing Bonfield).

The essence of republican government is government by consent. This consent has two distinct aspects — that public officials should be chosen by the people, and that these individuals, once in office, should be subject to the rule of law. *See Baker v. Carr*, 369 U.S. at 223 n.48 (quoting *In re Duncan*, 139 U.S. 449, 461 (1891)). Any gross deviation from these

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[3] This Section provides in full that: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4.

principles implicates the Guarantee Clause. Although the decision of the Supreme Court of Nevada does not prevent the people of the state from choosing their leaders, it does derogate radically from the rule of law, and on this ground is properly subject to review under the clause. Specifically, the decision of the Supreme Court of Nevada eviscerates a structural restraint imposed by the people of Nevada on their legislature without a coherent rationale grounded in text or precedent.

Although a super-majority requirement for new taxes is quite common,[4] it is not a universal rule, and therefore cannot itself be considered part of the irreducible minimum of a republican form of government. But this Court must not mistake a specific application of the Supreme Court of Nevada's reasoning for the reasoning itself. If allowed to stand, that Court's decision would justify the overriding of any number of so-called "procedural" rules that regulate the lawmaking process, notwithstanding their relationship to the principle of government by consent.

The Supreme Court of Nevada did not make the point explicitly, but in arriving upon its decision it necessarily took the position that the appropriate remedy in a case such as this takes its cue from the circumstances presented. Thus, if a bare majority of the members of each house of the legislature were willing to approve new taxes, the so-called "procedural" rule requiring a two-thirds majority to adopt new taxes would have

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[4] The Constitutions of at least ten states require a super-majority vote in the legislature to levy new taxes. *See* Ariz. Const. art. IX, § 22 (two-thirds); Ark. Const. art. V, § 38 (three-fourths); Cal. Const. art. XIIIA, § 3 (two-thirds), Del. Const. art. VIII, § 10, cl. a (three-fifths); La. Const. art. VII, Pt. 1, § 2 (two-thirds); Miss. Const. art. IV, § 70 (three-fifths); Nev. Const. art. IV, § 18, cl. 2 (two-thirds); Okla. Const. art. V, § 33 (three-fourths); Or. Const. art. IV, § 25 (two-thirds); S.D. Const. art. XI, § 14 (two-thirds).

to give way. *See Guinn v. Legislature of Nevada*, 71 P.3d 1269, 1275, *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003). But, under the Supreme Court of Nevada's reasoning, what exactly would render this procedural rule uniquely vulnerable to override? What if two-thirds of the members of the Assembly were willing to adopt new taxes, but only one-third of the members of the Senate? By the Supreme Court of Nevada's logic, the state's requirement of bicameralism, *see* Nev. Const. art. IV, § 18, cl. 1, itself merely "procedural," would need to give way, notwithstanding this Court's recognition in *INS v. Chadha* that bicameralism is one of the most important structural safeguards in the lawmaking system. *See* 462 U.S. 919, 948 (1983) ("The bicameral requirement . . . was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent."); *id.* at 951 ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings."). *See also* 1 Montesquieu, *The Spirit of the Laws*, bk. XI, ch. VI, at 159 (1823) ("The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting.").

Similarly, what if two-thirds of the members of each chamber were willing to adopt new taxes, but the Governor were opposed? Why would Nevada's requirement of presentment, *see* Nev. Const. art. IV, § 35, survive analysis, whereas the merely "procedural" requirement of a super-majority would not? Indeed, none of the provisions of Nevada's Constitution that governs the lawmaking process would be immune from the Supreme Court of Nevada's protean standard. This approach may be consistent with abstract notions of equity, but it is radically inconsistent with the notion of government by consent and government by the rule of law. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 127-28 (1995) (Thomas,

J., concurring) ("If their remedial discretion had not been cabined, Blackstone warned, equity courts would have undermined the rule of law and produced arbitrary government."). For this reason, this Court should grant the writ and review the decision below.

II. THE SUPREME COURT OF NEVADA'S DECISION EFFECTS A RADICAL AND DANGEROUS RE-ALLOCATION OF POWER WITH RESPECT TO TAXATION AND APPROPRIATION.

As this Court has noted, nothing compels the states to separate powers among the three branches of government in precisely the same manner as these branches are separated at the federal level. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). Without doubt, states retain extraordinary power to re-allocate power within their constitutional systems. But surely this observation cannot be taken so far as to permit such wholesale re-allocation of power as would make a mockery of the concept of government by divided power. As this Court has observed, the concept of a "republican form of government" does have *some* content, with principle reference to the role of the legislature:

> By the Constitution, a republican form of government is guaranteed to every State of the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, *and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.*

Baker v. Carr, 369 U.S. at 223 n.48 (1962) (quoting *In re Duncan*, 139 U.S. 449, 461 (1891) (emphasis added)). *See also*

The Federalist No. 51 (James Madison) ("In republican government, the legislative authority necessarily predominates.").

Among the prerogatives of the legislature, none is more firmly grounded in republican tradition than the power of the purse. Like the federal Constitution, the constitution of almost every state contains a provision expressly reserving the power of the purse to the legislature. For example, Article IV, § 19, of the Nevada Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." This is almost identical to Article I, § 9, clause 7, of the federal Constitution, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." This allocation of authority is one of the essences of representative government. *See* 4 Op. Off. Legal Counsel 16, 19-20 (1980) (describing the goal that "Congress will determine for what purposes the government's money is to be spent and how much for each purpose" as "elementary to a proper distribution of governmental powers"). Indeed, this allocation reflects one of the rallying cries for the American Revolution — "No taxation without representation."

This allocation finds strong roots in both history and practical experience. As a historical matter, only religion can account more fully for the English Civil War of the Seventeenth Century than the struggle between Parliament and the Crown over the power of the purse. Whereas England entered that century with a relatively high degree of prerogative vested in the Crown, and with a relatively limited power lying in Parliament either to pay for the Crown's activities or to resist paying for them, by the end of that century Parliament had converted this power into a general authority to direct the affairs of government through control of the purse. As one commentator has aptly noted:

> The evolution of British representative democracy and the power of the purse are inextricably intertwined. English monarchs traditionally used Parliament as a means of raising revenues, usually to finance their military adventures. Over the centuries, British Parliaments began to use this revenue-raising authority to exact legislative concessions from the Crown, threatening to withhold funds if their demands were not met. Parliamentary insistence on a voice in governing the nation inevitably lead to struggle with the monarchy, which was not eager to surrender its royal prerogatives. The struggle came to a head during the reign of the Stuart kings in the 17th century. By the end of the century, the nation had suffered a protracted civil war, one king had lost his head, another had been deposed in a bloodless coup, and the supremacy of Parliament had been established. By the time of the American Revolution, Parliament's dominance over the British public fisc was complete.

R. Rosen, *Funding "Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 28-29 (1998). Similar conclusions can be drawn from the French Revolution. *See* Simon Schama, *Citizens: A Chronicle of the French Revolution* 289-90 (1989).

The allocation of the purse strings to the legislature also makes profound sense as a matter of practical politics. Although the people elect their governors, no branch of the government is more fully representative of the people, and more fully authorized to spend their money, than the legislature. The legislature reconstitutes the polity in its variety of backgrounds and experiences. Unlike executive officials, legislators are not subject to reporting relationships, nor do they have limited portfolios in any formal sense of the phrase. Instead, they have

a direct, inalienable right to deliberate over the full range of issues presented for resolution, and to cast their vote accordingly.

To be sure, the people of Nevada have chosen to complicate their legislative process by imposing a two-thirds requirement for the levying of new taxes. But this Court should be loathe to identify such a requirement as a stranger to republican government. In fact, many of the rules governing the legislative process are designed to make that process more deliberative and thereby to protect vulnerable minorities and produce more pleasing results. As James Madison explained in Federalist No. 51:

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.

Nevada's super-majority requirement for new taxes is nothing more than a variation on this theme. Most notably, such a requirement protects vulnerable economic constituencies from targeted taxes. The people of Nevada may reasonably have concluded that it was altogether too easy for a simple majority of the two chambers of the legislature to impose taxes on select economic minorities, whereas concurrent super-majorities to impose the same taxes would not readily exist. By ordering the legislature of Nevada to disregard the state's super-majority requirement for new taxes, the Supreme Court of Nevada derogated radically and dangerously from the principle of popular control, through the legislature, over the purse.

It is true, of course, that the Constitution of Nevada contains a provision requiring the legislature to provide for public schools. *See* Nev. Const. art. XI, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year."). It is also true that the Supreme Court of Nevada, in issuing the decision that is the subject of the petition, purported to be enforcing this provision. *See Guinn*, 71 P.3d at 1275. But, in reading this provision as an essentially self-executing funding mechanism, with content to be judicially inferred, the Supreme Court of Nevada crossed the line between interpreting an organic legal document and governing without the consent of the population.[5]

As this Court is no doubt well aware, the constitutions of more than half the states require the legislatures thereof to provide for some support for education, often without elaborating on this abstract duty. The question then arises, whether courts could construe these provisions as a source of authority for the judiciary to impose taxes or appropriate funds, were the legislature not to act, without fatally undermining separation of powers. This is a profoundly difficult question, and one that would obviously call for delicate consideration, and strictly political resolution, if at all possible. As Justice Frankfurter observed in the somewhat similar circumstances of *Youngstown Sheet & Tube Co. v. Sawyer*:

> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that

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[5] In this regard, it must be noted that the people of Nevada have also chosen to retain at least some degree of sovereign immunity in their Constitution. *See* Nev. Const. art. IV, § 22 ("Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution.").

> arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle — preferably forever — a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits.

343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). *See also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (commenting on separation of powers at the federal level) ("That this system . . . produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people . . . ."); *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . .").

In the decision that is the subject of this petition, the Supreme Court of Nevada seems to have made precisely the error identified by Justice Frankfurter in *Youngstown*. Instead of approaching the difficult issues of separation of powers, responsibility for the fiscal affairs of government, and the proper scope of sovereign immunity with the delicacy required by the situation, that Court seized upon one of the most extraordinary forms of relief available — a mandamus against the legislature, requiring it to levy new taxes without regard to specific constitutional restraints on the lawmaking process. Without doubt, the concept of a "Republican Form of Government" and government by divided power does not contemplate that such difficult situations as those presented in this case will be short-circuited by the judiciary. As Justice

Maupin noted in his separate opinion in the instant case, the doctrine of separation of powers stands — or ought to stand — as an "impediment" to immediate judicial resolution of a case such as this. *See Guinn v. Legislature of Nevada*, 71 P.3d at 1277 (Maupin, J., dissenting in part and concurring in part). As Justice Maupin aptly observed, "[c]ertainly, the specifics of creating a budget fall within the discretion of the Legislature." *Id.* at 1278 (Maupin, J., dissenting in part and concurring in part).

III. THIS CASE IS FULLY JUSTICIABLE.

Reports of the non-justiciability of disputes arising under the Guarantee Clause are greatly exaggerated, and certainly merit clarification from this Court. Nothing in the nature of the clause requires such treatment. It is not, for example, a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department." *Baker v. Carr*, 369 U.S. at 217. Indeed, the clause commits responsibility for the guarantee to the United States as a whole, which includes the courts. As Justice O'Connor recently indicated in her opinion for the Court in *New York v. United States*, there is merit in considering judicial application of the clause if circumstances will permit. *See* 505 U.S. at 184-85. Amici respectfully submit that such circumstances are presented here, in an egregious and patent violation of the principles of government by consent.

In fact, no case better illustrates the potential susceptibility of disputes arising under the Guarantee Clause to resolution on the merits than *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the precedent commonly cited for the proposition that cases arising under the Guarantee Clause are non-justiciable. In *Luther*, this Court refused to decide which of two competing

governments was the lawful government of Rhode Island after the so-called "Dorr's Rebellion." Subsequent decisions of this Court seemed to assume that *Luther* exposed an inherent non-justiciability in the clause, *see, e.g.*, *Pacific States Tel. & Tel. Co. v. Oregon* 223 U.S. 118, 142-3, 151 (1912), but in fact the decision in *Luther* turned quite simply on commonplace notions as to the limits of the judicial function.

For example, by the time the case arrived to the Court, the President had already exercised power vested in him by Congress to make the militia ready to restore order in the state if such a step proved necessary. *See Luther*, 48 U.S. (7 How.) at 43-44. The case also presented the courts with an evidentiary nightmare. Although it was technically an action for trespass, had the federal courts addressed the case on the merits, they would ultimately have had to decide whether the voters of Rhode Island had lawfully established a new government by constitutional convention. In a lengthy analysis, Chief Justice Taney explained that a court of the United States would not have been competent to judge the qualifications of every voter in the state and to ascertain whether the voters had lawfully adopted a new constitution and government. *See id.* at 41-42.

Given this state of affairs, the Court's decision to avoid deciding *Luther* on the merits was an unexceptional application of the multi-factored test for non-justiciable political questions articulated by Justice Brennan in *Baker*. *See* 369 U.S. at 217. Because Congress and the President had acted, it was no longer possible for this Court to resolve the case "without expressing lack of the respect due coordinate branches of government." *Id.* Similarly, given the steps the President had taken to resolve the situation, there arose "an unusual need for unquestioning adherence to a political decision already made," as well as a

"potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*[6] Finally, given the specific issues the case would have presented, the Court might also have discerned a "lack of judicially discoverable and manageable standards for resolving it," *id.*, — especially at that time.

As Justice Brennan aptly noted in *Baker*, 369 U.S. 186, this Court's approach to the subject of non-justiciable political questions is not categorical, but instead is driven by the circumstances of the cases presented for review. As he concluded in that opinion after considering the subject at length, "[t]he cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Id.* at 217.

The Guarantee Clause is susceptible of judicial application in the appropriate case, and no case could be farther from the posture of *Luther v. Borden* than the instant one. Whereas, in *Luther*, Congress had already passed pertinent legislation and the President had already acted, in this case no other branch of the federal government has even purported to resolve the issues presented. Thus, there is no potential for "expressing lack of the respect due coordinate branches of government," nor is there "an usual need for unquestioning adherence to a political

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[6] It also bears notice that the issue of which of Rhode Island's two governments was lawful is conceptually similar to the issue of whether to recognize a foreign government as legitimate, or whether to recognize a particular group of Native Americans as a tribe, both of which Justice Brennan identified as political questions in his opinion for the Court in *Baker*. *See* 369 U.S. at 212, 215.

decision already made," or the "potentiality of embarrassment from multifarious pronouncements" on the issues presented. *Baker*, 369 U.S. at 217.

Finally, this Court has ample "judicially discoverable and manageable standards" for resolving this case. *Id.* The decision of the Supreme Court of Nevada that is the subject of this petition speaks for itself, and its incompatibility with the principles of government by consent is patent. If no structural rule governing the operation of the legislature of Nevada can stand up to the reasoning of that decision, and if that decision essentially transfers the power of the purse to the judiciary, then the decision radically and demonstrably deviates from the concept of a "Republican Form of Government." This Court is fully competent to review the decision of the Supreme Court of Nevada, and to require a resolution of the case in a manner not inconsistent with the Guarantee Clause.

CONCLUSION

This Court should grant the writ of certiorari.

Respectfully submitted,

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